Supreme Court, U.S.
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IN THE

SUPREME COURT

OF THE UNITED STATES

October Term 1994

No.

FELIPE B. CRUZ,
Petitioner,

v.

WILLIAM PERRY, SECRETARY,
DEPARTMENT OF DEFENSE,
Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit; Appendix

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QUESTIONS PRESENTED FOR REVIEW

1.) What must be shown to make a prima facie case of racial discrimination in "glass ceiling" cases? Is not such a case governed by this court's opinion in Patterson v. McLean?

2.) Where plaintiff shows that he is both Asian and Filipino, that he made the finals list of three best qualified candidates for a promotion to Resident Auditor, that he has been passed over for the promotion 8 times, and that on this occasion the successful candidate was white and had been already appointed to the position as acting director even before the Job Opening Announcement was made, has not plaintiff made a prima facie case of racial discrimination in failing to promote him?

3.) Where the Court of Appeals declines to establish the fourth legal element of a prima facie case of discrimination in failure to promote cases, may the court without violating the Due Process of law clause of the Fifth Amendment dismiss a case for failure to meet the fourth requirement? Must not such a case be remanded with instructions?

4.) May the Court of Appeals in a racial discrimination case apply a sexual discrimination precedent where the common knowledge present in racial discrimination acts to satisfy the proof missing in gender cases? Are gender cases sufficiently analogous as to be interchangeable as precedent in racial cases such that plaintiff at bar should have anticipated the application of sexual criteria to a racial claim?

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OPINIONS BELOW

The Court of Appeals' opinion is not officially reported but it is reproduced in the Appendix, Exhibit A, page 33. There is no written opinion from the trial court (Real, J.).

JURISDICTION

Jurisdiction of this court is based on 28 U.S.C. Section 1254 which permits review of final judgments of the United States Courts of Appeals, a judgment in this case filed on September 9, 1994 by the Ninth Circuit.

The original action sought damages under Title VII for racial and national origin discrimination under 42 U.S.C. Section 2000(e), et seq. and was brought in the Central District of California

which dismissed petitioner's claims of failure to promote and of retaliation.

On appeal, the Ninth Circuit affirmed the dismissal of the failure to promote claim but reversed and remanded the dismissal of the retaliation claim. There was no petition for rehearing.

Though the entire judgment is before the Court, only the failure to promote issue is pressed for review.

STATUTES, CONSTITUTIONS, ETC.

1.) 42 U.S.C. 2000e makes it unlawful to discriminate in employment based on race or national origin.

2.) The Fifth Amendment prevents the federal government from taking property without Due Process of law.

STATEMENT OF THE CASE

Petitioner Felipe Cruz is both Asian and of Filipino origin, classes protected by Title VII, 42 U.S.C. Section 2000(e). He holds a CPA certificate from the Philippines which he obtained in 1960.

After Cruz emigrated to the United States he joined, in 1978, the Defense Contract Audit Agency, Department of Defense, as an auditor, originally in the Los Angeles regional office. In 1981, Cruz transferred to the Field Detachment, which audits defense contractors, and which, due to the nature of the work, is set-off from the region behind a security curtain, or compartmented security. Nonetheless, Cruz, who entered Government service at GS-7, had reached GM-13 level, management promotions given despite the curtain.

Beginning in 1986, Cruz applied for a promotion to GM-14, Resident Auditor, a supervisory position. He applied 8 times

and each time was passed over. As a GM-13 Cruz had unofficially acted on several occasions as a GM-14, supervising 11-12 auditors and he had received several awards and commendations for his work in this capacity, both field positions in Redondo Beach and El Segundo, Los Angeles County, California.

While Cruz was temporarily - without the title - acting as GM-14 in the El Segundo office, Louis Bowers, a white and an employee of the Regional Office, was transferred by Robert Hubbard, the Southwest Regional Director, to the Acting Resident Auditor position filled by Cruz. Then, a JOA (Job Opening Announcement, 90-54) was posted inviting applications for the GM-14 position filled by Cruz, now supplanted by Bowers.

Both Cruz and Bowers applied, among at least 9 others.

William H. Reed, Director of Defense Contract Audit Agency, described the

promotion process by which he, at headquarters in Virginia, makes the selection of the successful candidate for the GM-14 position both Cruz and Bowers applied for. In this case, Reed sent to Hubbard (who had already appointed Bowers) a finals list of 11 candidates of which 7 made the Best Qualified List, including Cruz and Bowers. Hubbard, in turn, further winnowed the Best Qualified List to three candidates: Cruz, Bowers, and Moore (a black). Of these three, Hubbard chose Bowers, the candidate he had already given the job to, as the most qualified. And, acting on Hubbard's recommendation, Reed in fact appointed Bowers to the position.

Hubbard testified that he knew Bowers, as they worked together in the region, and they had fished together and shared rides to work. He met Cruz only once. (He said he knew Cruz had a Filipino CPA but did not know Cruz was

Filipino!) Finally, Hubbard justified his choice on the grounds that he had already appointed Bowers as acting Field Audit Office and Bowers had gained the experience in the job the other candidates did not have! (In fact, as noted above, Cruz had had the same "acting" experience.)

Cruz then filed a complaint under 42 U.S.C. Section 2000(e) before Judge Manuel J. Real in the Central District of California, who dismissed both the failure to promote and the retaliation claims. The Court of Appeals affirmed the failure to promote case based upon a sex-promotion case, neither cited nor relied upon by any party, but the court reversed and remanded the retaliation claim for a new trial. The Court of Appeals held that, despite meeting the McDonnell-Douglas criteria, more proof was needed for a prima facie case, the nature of which was left unspecified.

The court further noted that the prima facie case Cruz tried to make was negated by proof that another Filipino had previously been appointed to GM-14 and that Cruz had operated behind a security curtain, making him less well-known. These factors, the court implied, defeated Cruz's prima facie case, though the court also said these factors would not have negated a case if the proof - which the court would not specify - had been different.

Though finding the trial court erred in dismissing the case based on the Government's misrepresentation that Cruz's burden of proof was to show he was more qualified than Bowers, the court, based on its independent review of the record, affirmed (despite the reversible error[1], because no prima facie case had

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[1] This procedure is highly suspect. Where the appeals court cannot tell whether a case is decided on lawful grounds, the proper procedure is to remand. See Aikens, infra. A principal purpose of the Civil Rights Laws is to educate all, including judicial, officials. Riverside v. Rivera, 477 U.S. 561 (1986.)

been made under a local precedent that held that a woman who was qualified for a job which was given to a man failed to make a prima facie case of sexual discrimination. Hagans v. Clark, 752 F.2d 477, 481-482, n.1 (9 Cir. 1985) (Appendix, p. 39).

REASONS TO GRANT THE WRIT

I.

THE COURT OF APPEALS DECIDED A FEDERAL QUESTION INCONSISTENTLY WITH SETTLED LAW OF THIS COURT AND DEPARTED FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS

The principal reasons to grant the writ are three: (1) the court below held

that proof of the prima facie McDonnell Douglas[2] elements do not give rise to an inference of discrimination for failing to promote, a holding directly contrary to well-settled law of this court; (2) the court below also found on appeal that the reason Cruz was not promoted was that he operated behind a security curtain, a finding contrary to the allocation of proof by McDonnell Douglas, and a finding beyond the power of review of a dismissal for failure to make a prima facie case; and, (3) in affirming the dismissal for failure to make a prima facie case, the Court below relied upon one of its own precedents which was implicitly overruled by intervening law made here, and which local precedent left open for future determination an element of proof the court below required to have been proven in this case, raising an important

[2] McDonnell Douglas v.Green, 411 U.S. 792 (1973)

constitutional question of substantive Due Process. All these points are encompassed in this court's rule governing the grant of certiorari. See, Rule 10.1, (a) and (c).

The design here is to first set out the law established by this Court and then show how the court below departed from it. The Due Process issue is treated separately as the last point.

A.

A PRIMA FACIE CASE RAISES AN INFERENCE OF DISCRIMINATION WHICH RISES TO THE LEVEL OF A PRESUMPTION

Interestingly enough, the first promotion case under Title VII considered by this court was a glass ceiling case,

though that term was not widely used in 1983. (The court below treated this case as a glass ceiling claim. (Append. p. 34). In U.S. Postal Service Bd. of Govs. v. Aikens, 460 U.S. 711 (1983), Chief Justice Renhquist held that where the proof showed the plaintiff was black, that he had been employed since 1937, that the was an outstanding manager, that he was educated beyond the level needed for the position, that he had been passed over for 8 years, and that the whites receiving the promotion were less educated than he, an irreversible case of discrimination was made, were the trial court on remand to so find. These facts parallel those at bar: Cruz is Asian and Filipino, both protected classes, he has a CPA, he qualified for the promotion 9 times, he had received numerous commendations for his supervisory work, and the white actually appointed (yea, pre-selected, infra) has less education -

no CPA. (It's true a CPA is not a requirement for the position; but, even so, where a CPA exists, it is given bonus points.) The only significant difference between the Aikens and Cruz cases is that racial remarks present in Aikens are absent here. But on this point, Justice Renhquist held direct evidence of discrimination is not required. Id., 460 U.S., at 714,n.3. The Aikens court found it unnecessary to decide whether a prima facie case was made simply by showing Aikens possessed the qualifications and that a "non-minority" candidate got the promotion, though the court did not reject this formulation. Nonetheless, Justices Blackmun and Brennan concurred in a separate opinion on the specific understanding that the majority had reaffirmed "the framework established by McDonnell Douglas...for Title VII cases." Id., at 717. The inference that the prima facie cases for failing to hire and

failing to promote are the same is, therefore, strong. (And, as the case precedes by 2 years the Hagans decision, upon which the court below relied, the validity of Hagans was already open to question when it was decided.)

What was implied in Aikens was made explicit by Justice O'Connor 4 years later in Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1987), the court's second promotion case. Though the focus in Watson was whether statistics could prove a disparate impact case in failing to promote, in discussing disparate treatment, the court said, "Under the [McDonnell Douglas] scheme, a prima facie case [of racial discrimination] is ordinarily established of proof that the employer, after having rejected the plaintiff's applications for a... promotion, continued to seek applicants with qualifications similar to plaintiff's." (Emphasis added.) Id., at

986, citing Aikens at paragraph's end. (Again, no modification of the elements was suggested.)

Finally, this Court made unmistakably clear that in promotion cases the McDonnell Douglas elements apply without change. Thus Justice Kennedy held in Patterson v. McClean Credit Union, 491 U.S. 164 (1989)[3], that "...petitioner need only prove by a preponderance of the evidence that [he] applied for and was qualified for an available position, that [he] was rejected, and that after [he] was rejected respondent...filled the position with a white employee (cits.) Once the plaintiff establishes [this] prima facie case, an inference of discrimination arises. (Cits.) (Emphasis added.) Id., at 187-188. Thus what was implied in Aikens

[3] Patterson was "overruled" by statute on points related to Section 1981, a section not at issue here. Rivers v. Roadway Express, Inc., 114 S.Ct. 1510 (1994).

and made explicit in dicta by Watson becomes in Patterson the established law of promotion.[4]

B.

THE COURT OF APPEALS DEPARTS FROM PATTERSON

Despite noting that the Government and the trial court erred by requiring petitioner to prove he was more qualified than Bowers, the Court of Appeals nonetheless affirms based on its independent review of the record.

The Court states:

> It is true, as Cruz emphasizes, that he introduced evidence

[4] Patterson was not overruled by Rivers on this point. It remains good law for the proposition cited . As noted in the Statement of the Case, the trial court here, at Government's prompting, held contrary to Patterson that Cruz had to prove he was more qualified that Bowers to make a prima facie case. The Court of Appeals while seeing this error, refused to cite Patterson, or to reverse for this reason. This court needs to reaffirm Patterson because of the overruled aura surrounding it after Rivers.

showing that he was a member of a class of Title VII, that he was among those qualified for the promotion, and that Bowers, a white male with roughly comparable qualifications, obtained the promotion. Cruz, however, introduced no evidence that the decision impermissibly was based on national origin or race. See Hagans v. Clark 752 F.2d 477, 481-82 at n.1 (9 Cir. 1985.) (Appendix, pp. 38-39.) (Emphasis added.)

Is this not stupefying? Patterson holds that the McDonnell Douglas criteria apply to promotion cases. Patterson, supra, 491 U.S., at 186, 109 S.Ct., at 2378. But the effect of proving these criteria is to establish a prima facie case and thereby raise an inference of unlawful discrimination. Ibid.; Furnco

Construction Corp. v. Waters, 438 U.S. 567, 577. Is it not apparent that the Court of Appeals refused to recognize the inference compelled by proof of a prima facie case? That is, once the prima facie case is made a rebuttable presumption arises which precludes dismissal of the case - a presumption of unlawful discrimination. St. Mary's Honor Society v. Hicks, 113 S.Ct. 2742 (1993). This presumption arises as a matter of law and must be recognized. (Ibid.) To say, as the Court does, that McDonnell Douglas elements were proved but no evidence of discrimination was introduced is an oxymoron, revealing a complete lack of understanding of the ruling case law of this court, none of which is cited.

Instead, the Court below resorts to one of its own cases of sexual discrimination decided before Watson and Patterson which, in the facts there,

modified, unnecessarily, the fourth requirement of McDonnell Douglas in an unspecified way, and which case also held, contrary to Watkins, Patterson and St. Mary's (which were decided after Hagans) that proof of the McDonnell Douglas elements did not "necessarily" raise an inference of discrimination Hagans v. Clark, supra. Thus, in Hagans, the appeals court first holds that in a failure to promote case the fourth element of McDonnell Douglas - that the position remained open after plaintiff's rejection (in Hagans a male actually filled the position)—was not completely applicable. Patterson, however, decided 5 years later, implicitly overrules this view by holding that the fact that a white male is given the position, rather than the position remaining vacant, does meet the McDonnell Douglas, supra, 491 U.S., at 187-188, 109 S.Ct., at 2378. (This holding was foreshadowed by Watson

in 1987 where Justice O'Connor opined that prima facie case was made when plaintiff showed she was rejected for a promotional position for which her employer continued a search. Id., 487 U.S., at 986.)

Secondly, however, Hagans refused to recognize that a showing that a similarly qualified male was hired "necessarily" raises an inference of intentional discrimination. Hagans, supra, 752 F.2d, at 781-782, n.2. As pointed out above, this is not so. Just the opposite is the case. As Justice Kennedy in Patterson held, once it is shown that the position was filled by a white male, an inference of discrimination arises. Id., 491 U.S., at 187, 109 S.Ct., at 2378; see also, Furnco Construction Corp. v. Waters, supra, 438 U.S., at 577. Indeed, where the prima facie case is made, as here, the inference effectively becomes a presumption. Texas Dept. of Community

Affairs v. Burdine 456 U.S. 248, 254. Justice Scalia holds this presumption operates to produce a required conclusion in the absence of explanation. St. Mary's Honor Society v. Hicks, supra. Surely an inference rising to the level of a presumption is evidence of the fact presumed, i.e., intentional discrimination. For the Court below to hold Cruz introduced "no evidence" of discrimination is a stupefying departure from both logic and law where the record is as the court describes it! Though Hagans is otherwise distinguishable - it was remanded twice for the proof the court found missing on the third appeal - our position is that it was implicitly overruled by Patterson and it cannot be relied upon to affirm a dismissal where the Patterson elements are proved. Furthermore, we maintain, that if Hagans retains vitality, it is limited to cases

of sexual discrimination, or is limited to its facts.

C.

ADDITIONAL EVIDENCE SUPPORTED THE CHARGE

Alternatively, if the Court below can seek refuge in a McDonnell Douglas footnote which disavows an intent to specify the order of proof in all discrimination cases, such that more or different evidence must be proved, nonetheless such facts were proved here.

Cruz showed he had been passed over 8 times for this position! He also showed that Bowers, the successful candidate, and Hubbard, the regional director, were friendly, had fished together and shared rides to work. Indeed, he showed Hubbard pre-appointed

Bowers to the position as acting director even before the job opening was even announced! The inference of favoritism was strong, an inference at odds with merit promotion. (It need not be overstated that if favoritism were the real reason for the appointment, it would not meet the employer's burden to show a "legitimate, nondiscriminatory" reason for Bowers' selection. See, Patterson, supra, 491 U.S., at 187, 109 S.Ct., at 2378.) But, more to the point here, favoritism is simply the obverse side of the same coin of discrimination. Liking a white friend more than a Filipino with whom one is only barely acquainted hardly is the kind of subjective criterion permitted as a basis for promotion as it perpetuates the very stratification Title VII was meant to remedy. See, Teamsters v. United States, 431 U.S. 324, 347-348. (Correlatively, in a merit system, favoritism is not a lawful criterion for

the exercise of subjective judgment. See, Burdine, supra, 450 U.S., at 259; Watson, supra, 487 U.S., at 991.)

After all, the burden in discrimination cases is not meant to be onerous. Burdine, supra, 450 U.S., at 577. But the court below creates an insuperable burden by shunting aside the "common experience" (Furnco, supra, 438 U.S., at 577.) that makes the Patterson elements probative. By requiring additional proof of an unspecified nature, the appeals court effectively scuttles all circumstantial cases.

D.

THE FACTORS ALLUDED TO GO TO THE WEIGHT OF THE EVIDENCE, NOT ITS SUFFICIENCY

Also, the Court below makes additional contradictory statements which

defy logic. In affirming the dismissal for failure to make a prima facie case, the court says Cruz shows certain facts which would not defeat a prima facie case if the case were supported by additional, unspecified evidence! The Court effectively creates a proposition of four terms using the first term - "inference" - in two different senses. First the court holds that proof of the Patterson elements does not make a prima facie case. But, in disposing of the promotion claim, the court concludes the "inference-not-made" would not be defeated by the other facts proved if the "inference-made" were also supported by additional evidence. The court is caught in a vise of its own making, which denies petitioner Due Process of law as it is unintelligible.

The Court says Cruz shows as part of his case that he was behind a security curtain and therefore at a disadvantage

for promotions. Cruz also showed, the court continued, that one Filipino woman had actually received the position Cruz was denied. These facts, the Court says, would not defeat a prima facie case supported by other evidence, but such evidence is missing here! Thus, the Court compounds its error in several ways and by a slip of the pen betrays itself by tacitly admitting Cruz had made a case it consciously says he did not make.

Taking the points in reverse order, however, the fact that a Filipina had been promoted to the level Cruz also sought would not defeat Cruz's case because Furnco holds the obligation imposed by Title VII is to provide an equal opportunity to each applicant regardless of race, without regard to whether members of the applicant's race are already "proportionately" represented in the work force. Id., 438 U.S., at 579. Thus even if one Filipina were

proportional (a fact not shown), it should not have defeated Cruz's claim. This, too, is a marked inconsistency with the law this Court has established.

Secondly, however, the suggestion that Cruz was not promoted because of the security curtain, does not in any way derogate from the prima facie case that he made. He made the Best Qualified List and qualified for the ninth time! Yet the Court seems to say, absent other evidence, it just proves he was not known well-enough! Can this be? Especially when it is shown that Bowers was pre-appointed, the inference that the selection process was a sham, indeed was a ratification, surely gives rise to an inference that Cruz simply was not under serious consideration, not that he was unknown. At the very least, this should not be a finding made <u>on appeal</u> as it clearly calls for weighing evidence, an act outside the scope of review, even in

a 52(c) case, which limits the weighing process to the finder of fact, not its reviewer.

And, anyway, the court treated the review as from a dismissal for failure to make a prima facie, the review of which requires the court to draw all legitimate inferences in favor of the petitioner, not against him! But suggesting the reason Cruz was not appointed was because of the security curtain not only draws an inference against Cruz, it also affirmatively carries the employer's burden for a reason the employer itself did not in fact give in its evidence! (The case was dismissed after two Government witnesses had testified out of turn.) That this carries artificiality to new heights is a point which could not be lost on anyone, especially since a reason not actually given would necessarily have to be

pretextual if raised for the first time on appeal, even by the court!

II

APPLYING A CASE FACIALLY OVERRULED BY LATER CASES VIOLATES DUE PROCESS

Last, but by no means least important, Cruz wishes to protest in the strongest terms the application of the Hagans case which is at least facially overruled by later law from this court. Clearly, courts, as state agents, are subject to constitutional restraints. Florida v. Rodriguez 469 U.S. 1, 105 S.Ct. 308 (1984). Here, the appeals court resurrects the Hagans case, which under any apparent view was no longer valid, as

Hagans' pronouncements are directly contradicted by Patterson, Watson, Aikens, and Furnco. If by some act of divination, Hagans retains a vestigial vitality, it clearly runs afoul of the Fifth Amendment to deprive Cruz of a promotion based on it as there is no basis for thinking it had any application; indeed the Government did not cite it! This goes to the very heart of the judicial process: courts cannot take property by ipse dixit. Florida v. Rodriguez, supra. To resurrect Hagans now, after all the intervening cases directly contra, represents a significant change in the law which could not have been foreseen. Elemental fairness requires that, if Hagans remains good law, petitioner should be given a chance to meet Hagans' requirements, a chance Hagans herself was given not once, but twice! And, in particular, as Hagans itself leaves open the fourth requirement

under McDonnell Douglas, petitioner should be told what the law requires of him to carry his burden. Hagans perpetuates a vagueness that would not be tolerated of a statute having the same effect; indeed, insofar as Hagans leaves open and unspecified a requirement of positive law the nature of which remains a mystery until too late on appeal, it runs afoul of basic notions of fair play and substantial justice vouchsafed by the Due Process Clause. It hardly suffices to say there is a fourth element which the court cannot specify, but which the court will recognize when it sees it. A future law is no law at all.

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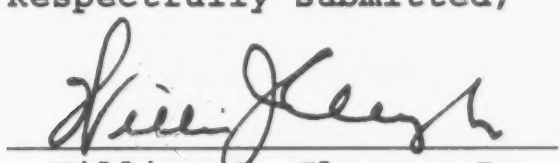
Conclusion

The petition shows important departures from and inconsistencies with established precedent of this Court. Not only does the court below refuse to recognize this authority, it resurrects authority overruled by the very authority it refuses to cite, resurrected authority which itself deliberately leaves open for future determination an element the court holds must be met in the present case, but about which the court continues to remain silent. This silence and, indeed, mystery, invites the same kind of judicial ipse dixit this Court has already found repugnant to the Constitution in matters of property. The court below also weighs the evidence on appeal finding it short of the Court's unstated requirement, as though the taking of property were a discretionary judicial power, discretion the limits of

which are in the process of discovery. This will not do as the issue is one of substantive, not procedural, Due Process. And, in any event, a discretion unbounded defines the essence of arbitrary power, the very opposite of the limited power given the Government by the Constitution, the final authority.

Date: October 4, 1994

Respectfully submitted,



William J. Cleary, Jr.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEPT. 9, 1994

CATHY A. CATTERSON, CLERK

U.S. COURT OF APPEALS

FELIPE B. CRUZ, Plaintiff-Appellant,	NO. 93-5468 D.C. NO. CV-92-03109-R
V.	MEMORANDUM*
LES ASPIN, Secretary Department of Defense Defendant-Appellee	

Appeal from the
United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Argued and Submitted August 1, 1994
Pasadena, California

Before: D.W. NELSON, and NOONAN, Circuit Judges, and KING,** District Judge

Felipe Cruz ("Cruz") appeals the district court's dismissal of his Title VII discrimination claims against his employer, the Defense Contract Audit Agency ("DCAA"" or "Agency"). Cruz, employed as a supervisory auditor (GM-13 level) at the DCAA, alleges that his advancement within the Agency repeatedly has been foiled in recent years, and that he has run into a "glass ceiling" based on his national origin (Filipino) and his race (Asian). Cruz asserts that, since 1986, he has been denied a promotion to a GM-14 position on at least eight separate occasion, and bases his present Title VII challenge on the DCAA's denial in 1991 of

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R.36-3.

** The Honorable Samuel P. King, United States District Judge for the District of Hawaii, sitting by designation.

his application for a promotion to the Office Manager position at the DCAA's El Segundo office. Cruz claims that the district court erred both in concluding that he failed to establish a prima facie case of disparate treatment, and in concluding that he failed to establish a prima facie case on his claim that his DCAA supervisors illegally retaliated against him for filing an EEOC complaint. We have jurisdiction under 28 U.S.C. Section 1291. We affirm in part, reverse in part, and remand for further proceedings.

I. FAILURE-TO-PROMOTE CLAIM

Cruz contends that the district court erred as a matter of law in concluding that he failed to establish a prima facie case of disparate treatment. We disagree. Although certain portions of the transcript of the oral hearing on

the Rule 52(c) motion support Cruz's position, after an independent review of the record we conclude that the district court's written finding that "Mr. Cruz presented no evidence that either race or national origin was a factor on Mr. Cruz's not receiving the...promotion," adequately supports the court's judgment. Cf. Kern Oil & Refining Co. v. Tenneco Oil Co., 792 F.2d 1380, 1385-86 (9th Cir. 1986) (noting that although a district court's findings are reviewed for clear error even where the court adopts a party's proposed findings verbatim, "'close scrutiny' of the record is appropriate" in such circumstances) (internal citation omitted), cert. denied, 480 U.S. 906 (1987).

At the oral hearing on the Rule 52(c) motion, the DCAA asserted that Cruz's failure-to-promote claim should be dismissed because Cruz had not "shown that he's more qualified for the position

than Louis Bowers [the individual who was promoted]." After counsel for Cruz claimed that no such showing was required to establish a prima facie case, the court emphasized that "[Cruz is] not the only qualified applicant here. There are [seven]." The court thus appears to have accepted the employer's contention that a plaintiff in a failure-to-promote case must show that he or she was better qualified than the person who was promoted. If it were clear that the district court had accepted the DCAA counsel's argument and had based its ruling solely on Cruz's failure to establish that he was better qualified than Bowers, we would have to reverse. We know of no disparate case imposing such a requirement. The test, rather, is whether the plaintiff has offered evidence sufficient to "'give rise to an inference of unlawful discrimination.'" Yartzoff v. Thomas, 809 F.2d 1371, 1373

applied for a GM-14 position, Zennie Pangilinan, had been promoted to such a position two years previously. Although these latter facts alone would not be sufficient to defeat an inference of discrimination if the inference were supported by other evidence, the record here is entirely devoid of such evidence.

II. RETALIATION CLAIM

Cruz contends that the district court erred in concluding that he failed to establish a prima facie case of retaliation. We agree.

"A plaintiff may establish a prima facie case of retaliation by showing that (1) he engaged or was engaging in activity protected under Title VII, (2) the employer subjected him to an adverse employment decision, and (3) there was a

causal link between the protected activity and the employer's action." Yartzoff v. Thomas, 809 F.2d 1371, 1375 (9th Cir. 1987). There is no question that Cruz's decision to file an EEOC complaint is a protected activity under Title VII. Cruz also established that his performance rating dropped for the first time ever within months of filing the complaint, thereby carrying his burden of showing that he suffered an adverse employment decision. See, id. at 1376 (stating that a performance rating drop constitutes an adverse employment decision within the meaning of Title VII.) The only remaining question is whether Cruz's evidence established the necessary causal link between his EEOC filing and the adverse evaluation.

At the oral hearing on the Rule 52(c) motion, the district court suggested that Cruz's only evidence of a causal link was that Warren Wright,

Cruz's immediate supervisor, had raised his voice against him. The court also suggested that it did not believe the testimony of Rogers, who had testified that Wright was out to get Cruz. The court did not, however, question the credibility of Cruz or of any of his other witnesses. In its written conclusion of law, the court mentions only Wright's alleged "yelling" and the alleged impropriety of the investigation by the Inspector General's office. Cruz's evidence, however, was far more extensive. We conclude that, even disregarding the evidence discounted by the district court, that evidence established the causal link necessary to give rise to an inference of unlawful retaliation.

Cruz testified that, immediately after filing the EEOC complaint, he informed Wright of his action. Cruz claimed that Wright told him that he

"didn't have any leg to stand on" and suggested that his rating could decrease as a result of having filed the complaint. Cruz also detailed what he described as unusually close supervision from Wright and his successor and a pattern of retaliatory harassment in the ensuing months. He explained that, within two or three months of his filing of the complaint, Wright had his unit perform a special, time-consuming "floor check" despite considerable time pressure to finish scheduled audits. He further claimed that Wright gave conflicting instructions to him and the people working under him. He noted that one auditor was transferred out for 3-4 weeks in June 1991 and that another was transferred out permanently in July, leaving his unit shorthanded. Finally, Cruz introduced evidence tending to show that his performance rating decrease was arbitrary. He testified that, prior to

the filing of his EEOC complaint, Wright had given him a superior rating. He also testified that his rating was decreased despite the fact that he had completed 31 of 41 scheduled audits, whereas Roger Samuel, another supervising auditor at El Segundo who completed only 6-8 of 40 audits, did not have his rating decreased.

Under established Ninth Circuit precedent, this evidence suffices to establish the final element of Cruz's prima facie case of retaliation. See Yartzoff, 809 F.2d at 1356 ("Causation sufficient to establish the third element of the prima facie case may be inferred from circumstantial evidence, such as the employer's knowledge that the plaintiff engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory employment decision.").

Accordingly we reverse the district court's judgment in favor of the DCAA on Cruz's retaliation claim and remand the case to the district court. On remand, the DCAA should have the opportunity to present legitimate, nondiscriminatory reasons for its challenged actions. If it does so, Cruz must be afforded an opportunity to show that those reasons were pretextual and that the DCAA's action were based on impermissible considerations. See St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742 (1993).

III. JURY TRIAL

The Supreme Court's decision in Landgraf v. USI Film Products, 114 S.Ct 1483 (1994), forecloses Cruz's claim that he was entitled to a jury trial. Cruz concedes that the jury trial provision of the Civil Rights Act of 1991 would be

applicable in this case only if the provision applies retroactively. In Landgraf, decided after the briefs were filed, the Supreme Court expressly ruled that the provision, set forth in Section 102 of the Act, does not apply retroactively.[1]

CONCLUSION

For the reasons stated above, we affirm the district court's judgment in favor of the DCAA on Cruz's failure-to-promote claim, but reverse the court's dismissal of his retaliation claim. REVERSED and REMANDED.

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[1] In his "Notice of New Authority," filed on May 27, 1994, Cruz makes the argument that "the rule [set forth in Landgraf] does not apply to cases arising in California." This argument borders on the frivolous. Cruz has presented no basis upon which this court conceivably could distinguish Landgraf.

Supreme Court, U.S.
FILED
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No. 94-637

In the Supreme Court of the United States

OCTOBER TERM, 1994

FELIPE B. CRUZ, PETITIONER

v.

WILLIAM J. PERRY, SECRETARY OF DEFENSE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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55 pp

QUESTION PRESENTED

Whether the court of appeals properly upheld the district court's decision to dismiss petitioner's Title VII discrimination claims under Fed. R. Civ. P. 52(c) after petitioner presented his full case to the district court.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 33-46) is unpublished, but the decision is noted at 35 F.3d 570 (Table). The district court's judgment (App., *infra*, 23a-24a) and findings of fact and conclusions of law (App., *infra*, 1a-22a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 1994. The petition for a writ of certiorari was filed on October 6, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a Supervisory Auditor (salary level GM-13) with the Defense Contract Audit Agency (DCAA). Pet. App. 34. In late 1990, petitioner applied for a promotion to the position of Resident Auditor (salary level GM-14), and his name was submitted on a "finals list," along with the names of ten other applicants, to the Director of DCAA. App., *infra*, 8a; see also Pet. 4-5. On January 4, 1991, Louis D. Bowers, a white candidate, was selected for the position. App., *infra*, 11a. Petitioner subsequently filed the instant action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, alleging that he was denied promotion based on his national origin (Filipino) and his race (Asian). App., *infra*, 2a; Pet. App. 34-35.[1]

2. The district court conducted a bench trial on February 23, March 2, and March 4, 1993, during which petitioner fully presented his case and the government presented two witnesses. App., *infra*, 2a, 20a. The government then moved for the dismissal of petitioner's case under Fed. R. Civ. P. 52(c), see App., *infra*, 19a-20a, which permits trial courts to rule on the merits against a plaintiff in cases tried without a jury at any point after the presentation of the plaintiff's case.[2] The district

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[1] Petitioner also alleged that his superiors retaliated against him for filing a complaint with the Equal Employment Opportunity Commission. Pet. App. 35. The court of appeals remanded that claim to the district court for a new trial, *id.* at 45, and it is not involved in this petition.

[2] Fed. R. Civ. P. 52(c) provides:

> **(c) Judgment on Partial Findings.** If during a trial without a jury a party has been fully heard with respect to an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that

court granted the government's motion, concluding that petitioner had "presented no evidence that either race or national origin was a factor in [his] not receiving the * * * promotion," *id.* at 11a, and that petitioner "did not prove that the legitimate reasons offered by the DCAA * * * were a pretext for discrimination," *id.* at 20a. In reaching its decision, the district court further stated that petitioner had "presented no evidence that he was more qualified for the promotion than Mr. Bowers." *Id.* at 11a.

3. The Ninth Circuit affirmed the dismissal of petitioner's failure-to-promote claim. Pet. App. 35-40. Although the court of appeals believed the trial court erred in accepting the "contention that a plaintiff in a failure-to-promote case must show that he or she was better qualified than the person who was promoted," *id.* at 37, it affirmed the lower court on the ground that petitioner had failed to make out a prima facie case of discrimination, *id.* at 38-39. The court of appeals acknowledged that petitioner had "introduced evidence showing that he was a member of a class protected by Title VII, that he was among those qualified for the promotion, and that Bowers, a white male with roughly comparable qualifications, obtained the promotion," *id.* at 38, but found that petitioner "introduced no evidence tending to show that the [promotion] decision impermissibly was based on national origin or race," *id.* at 38-39.

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party on any claim * * * that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule.

ARGUMENT

Petitioner's principal contention is that the court of appeals erred in holding that petitioner did not establish a prima facie case of disparate treatment. Pet. 15-21. This point is correct, but ultimately of no consequence. The district court decided this case under Fed. R. Civ. P. 52(c) after hearing both the full presentation of petitioner's case and the testimony of two government witnesses. See App., *infra*, 2a, 20a. The court therefore was not confined to determining whether petitioner had established a prima facie case; it was free to rule on the merits of the case, which it did in favor of the government, holding that petitioner had failed to "prove that the legitimate reasons offered by the DCAA [for not promoting petitioner] * * * were a pretext for discrimination." *Id.* at 20a.[3] That holding was not clearly erroneous, and the Ninth Circuit correctly affirmed.

The framework for determining liability in Title VII cases is well settled. The plaintiff has the initial burden of establishing a prima facie case of discrimination, and "[t]his may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973); see also *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 186-

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[3] For this reason, it also is beside the point that the court of appeals, in determining that petitioner had failed to establish a prima facie case, may have relied on a local precedent that allegedly misconstrues decisions of this Court. See Pet. 28-30.

187 (1989) (fourth factor also satisfied if plaintiff shows that the employer "filled the position with a white employee"). If the plaintiff establishes a prima facie case, the burden "shift[s] to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell Douglas*, 411 U.S. at 802; see also *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 256 (1981). If the defendant meets this burden, the plaintiff then must prove that the defendant's justifications are a pretext for discrimination; or, that "a discriminatory reason more likely motivated the employer" than the reasons given. *Burdine*, 450 U.S. at 256; see also *St. Mary's Honor Ctr.* v. *Hicks*, 113 S. Ct. 2742, 2747 (1993).

This Court has emphasized, however, that "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains * * * with the plaintiff" at all times. *Hicks*, 113 S. Ct. at 2747 (quoting *Burdine*, 450 U.S. at 253). The district court must decide "which party's explanation of the employer's motivation it believes." *United States Postal Serv. Bd. of Governors* v. *Aikens*, 460 U.S. 711, 716 (1983). In the instant case, the government rebutted the presumption of discrimination raised by petitioner's prima facie case by presenting both documentary evidence and the testimony of two agency officials involved in the selection process. See App., *infra*, 20a. This evidence satisfied the district court that the employee promoted was "more qualified" than petitioner. *Ibid.* The district court's finding of fact in this regard was supported by the evidence and was not clearly erroneous.

The government introduced a memorandum from the former Regional Director of the DCAA, Robert Hubbard, to Director William Reed, which indicated that

Mr. Bowers, the individual promoted, was highly qualified because of his "varied DCAA experience as a supervisory auditor" and his "clearly demonstrate[d]" ability "immediately [to] manage the broad audit functions of a large field office." App., *infra*, 10a (quoting memorandum). By comparison, petitioner's "experience ha[d] been limited" and he "would need a longer development period before he could be expected to manage the broad audit functions of a Field Audit Office." *Id.* at 11a. In addition, Mr. Bowers' performance ratings for the preceding fiscal year had been superior to those of petitioner. *Ibid.* Director Reed, the government's second witness, testified that he concurred with Regional Director Hubbard, based on his judgment that "Mr. Bowers [was] the most qualified applicant for the position." *Ibid.*

The government thus met its burden of "articulat[ing] some legitimate, nondiscriminatory reason" for its decision to promote Mr. Bowers rather than petitioner. *McDonnell Douglas*, 411 U.S. at 802. This evidence was "legally sufficient to justify a judgment for the defendant," *Burdine*, 450 U.S. at 255, given the district court's conclusion that petitioner failed to prove that the government's justifications were merely a pretext for discrimination.

The district court specifically found that neither the Director nor the Regional Director was aware of the race or national origin of petitioner prior to selection, and that the Director also was not aware of Mr. Bowers' race or national origin. App., *infra*, 11a. Petitioner nonetheless claims that he "proved" discrimination with evidence showing that he previously had been "passed over" for the same promotion and that the successful candidate and the Regional Director "were friendly." Pet. 21. As noted by the court of appeals, however, the

significance of the first contention is undermined by petitioner's own concession that "the only other Filipino to have applied for a GM-14 position * * * had been promoted to such a position two years previously." Pet. App. 39-40. As to the second contention, evidence of friendship between the chosen candidate and the Regional Director does nothing to demonstrate that the decision against petitioner was motivated by any racial or national origin animus.

The court of appeals did not err in concluding that "[t]here is no direct evidence of discriminatory motivation in the record" and that "the circumstantial evidence introduced by [petitioner] actually undermines his contention that the DCAA's decision was discriminatory." Pet. App. 39. Petitioner not only conceded that the only other Filipino to have applied for promotion to a GM-14 position received that promotion, but he also acknowledged that, "as a general matter, DCAA employees who work in the Field Detachment, such as himself, are at a significant disadvantage when it comes to promotions." *Ibid.*[4] This evidence reinforces the government's contention that race and national origin did not play a role in the instant promotion decision. Accordingly, the court of appeals correctly affirmed the judgment for the government.

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[4] Indeed, a memorandum written by petitioner before the events at issue in this case reveals that he was informed by a superior, *prior* to accepting a transfer to the Field Detachment, that such a transfer would "jeopardize [his] chances for promotion in the [Los Angeles] region." App., *infra*, 4a. This is apparently so because employees in the Detachment operate behind a "security curtain" and thus may have limited contacts with management personnel outside the Detachment offices. See *ibid.*; *id.* at 5a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1995

APPENDIX A

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UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CV 92-3109-R

FELIPE B. CRUZ,
PLAINTIFF

v.

LES ASPIN, SECRETARY DEPARTMENT OF DEFENSE; U.S.A.,
DEFENDANT

[FILED MAR. 30, 1993]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

[Local Rule 14.3]

This case was tried commencing on February 23, 1993, and continued on March 2, 1993 and March 4, 1993, before the Honorable Manuel L. Real, Chief United States District Judge. Appearances were: For plaintiff, George Hightower, Esq.; for defendant, Terree A. Bowers, United States Attorney, Leon W. Weidman, Assistant United States Attorney, Chief, Civil Division, by Robert I. Lester, Assistant United States Attorney.

Having heard the testimony of the witnesses, having studied the documentary evidence, and having given the matter due consideration, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. This is an action brought by plaintiff Felipe B. Cruz against defendant Les Aspin,[1] Secretary, Department of Defense, for alleged employment discrimination (racial and national origin) for failure to promote, and for reprisal, under Title VII, 42 U.S.C. § 2000e, *et seq.*

2. Mr. Cruz submitted a timely claim of discrimination based on his claim that he was not promoted to a GM-14 Resident Auditor position pursuant to Job Opportunity Announcement ("JOA") 90-54 (Resident Auditor) GM-511-14, Hughes/El Segundo Resident Office, Los Angeles, Southwestern Region, of the Defense Contract Audit Agency ("DCAA"), dated November 7, 1990. Mr. Cruz brought a timely Title VII action based on that non-promotion and subsequent reprisal.

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[1] Les Aspin was substituted for his predecessor, Dick Cheney, erroneously sued as Richard Chaney, as Secretary of Defense. Fed.R.Civ.P. 25(d).

3. Mr. Cruz was born in the Philippine Islands. Pre-trial Conference Order ("PTC") ¶ 5a.

4. Mr. Cruz passed the Philippine Islands CPA exam and received a Philippine Islands CPA Certificate in 1960. PTC ¶ 5b.

5. Mr. Cruz sat for the CPA examination in California in about 1970 and he failed parts and passed a part of the examination. Mr. Cruz has not re-taken the CPA examination in the United States. PTC ¶ 5d.

6. The DCAA audits Government contractors. PTC ¶ 5c.

7. Mr. Cruz began employment with the DCAA on January 1, 1978 as a GS-7. PTC ¶ 5c. He was promoted to a GS-9 position in 1979, to a GS-11 position in 1980, and to a GS-12 position in 1982. PTC ¶ 5e.

8. Mr. Cruz was with the Regional DCAA office until 1981. Thereafter he was transferred to the Field Detachment of the DCAA, for which he continues to be employed. PTC ¶ 5f; Trial Transcript[2] 104-105. The Field Detachment differs from the "regular" DCAA in that the auditors in the Field Detachment perform audits of those contracts which require compartmented security. Due to the nature of Field Detachment security concerns, Field Detachment auditors may have only limited contacts with DCAA auditors who would [*sic*] in the regular DCAA. PTC 5f. For example, auditors in the Field Detachment did not regularly report to Robert Hubbard when he was the Director of the Southwestern Region of DCAA. Trial Transcript 160.

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[2] "Trial Transcript _____" reflects citations to the transcript of the first day of trial. Defendant has not ordered or received a transcript for the second day of trial.

9. Mr. Cruz was promoted to DCAA's supervisorial position, GM-13, in July 1984, and has worked at various Field Detachment offices since then. PTC ¶ 5g & 5h.

10. Mr. Cruz wrote a memorandum to Deputy Audit Manager Henry Young on October 18, 1983 "thru" Richard Gordon, Branch Manager, in which Mr. Cruz stated:

> After accepting a job with the detachment and prior to your picking me up, *I was told by my manager that I was making a mistake in going to the detachment, that it would put me out of touch with LA regional management personnel and jeopardize my chances for promotion in the LA region.* Further I was told that when I came back I would probably have to work for the region for two to three years before I could be considered for promotion since no one could know what I did while in the detachment.
>
> It appears as if this prediction is coming true because it is obvious now that DETA experience and ratings cannot be relied on for advancement in the LA region.

Exhibit 210 (emphasis added).

11. On October 28, 1983, Richard Gordon wrote a memorandum to Deputy Audit Manager Henry Young about Mr. Cruz's October 18, 1983 memorandum. Mr. Gordon asserted that Field Detachment personnel are underrated in comparison to Los Angeles Regional personnel. Mr. Gordon complained that Field Detachment auditors are not able to show Regional personnel what they can do because of the Field Detachment's "security curtain (being out of the mainstream)". Exhibit 225. Mr. Cruz agreed with Mr. Gordon's opinions. Trial Testimony 121-122.

12. Mr. Cruz's memorandum on October 18, 1983 (Exhibit 210) further stated: "My CPA is in the Philippines and is not transferrable."

13. Mr. Cruz did not file an EEO complaint based on the fact that his CPA was not transferrable. Trial Transcript 116.

14. Mr. Cruz first applied for a GM-14 position in 1986 and thereafter he has applied at least eight times. PTC ¶ 5j.

15. Section 2 of Chapter 36 of the DCAA'S personnel manual is the DCAA's written promotion policy. PTC ¶ 5n; Exhibit 1.

16. The DCAA's selection process for GM-14 Field Audit Office Managers positions is as follows:

a. A Job Opportunity Announcement ("JOA") is published.

b. Applicants submit an application to the Civilian Personnel Office at DCAA Headquarters in Alexandria, Virginia.

c. Each applicant's points are determined by considering: Pertinency and level of experience (25%); supervisory assessment of ability to perform higher level work (60%); education and CPA (10%); and professional and self-development activities (5%).

d. The DCAA's Career Development Board convenes to review the applications and compile a Best Qualified List (BQL).

e. The BQL is sent to the Regional Director.

f. The Regional Director writes a memorandum to the Director in which he compares the qualifications of the persons on the BQL, and

makes a recommendation on who should receive the promotion, often including a second or third choice.

g. The Regional Director's recommendation is sent to the DCAA Personnel Office, where it becomes part of the package submitted to the Director. The Deputy Director may also make a recommendation for the promotion.

h. The Director makes the selection of the applicant who will be promoted.

17. Before Robert Hubbard, then the Regional Director,[3] would prepare his recommendation for the Director, either he or his deputy would contact each applicant's supervisor to ask that supervisor about the applicant's experience under that particular supervisor. PTC ¶ 5p; Trial Transcript 164-166.

18. The absence of a CPA does not disqualify a person for a GM-14 Resident Auditor position. Trial Transcript 105 and 141-142.

19. The DCAA does not guarantee a promotion for every GM-13 to a GM-14 position. Trial Transcript 119. There are approximately three to four GM-13 positions for every GM-14 position. Trial Transcript 119-120.

20. William Reed, the DCAA Director, is not required to and generally does not interview the applicants for GM-14 Field Audit Office Manager positions. Trial Transcript 139.

21. Mr. Hubbard was not required to and generally did not interview each GM-14 applicant. Trial Transcript 166.

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[3] Mr. Hubbard has retired from Government service. Trial Transcript 160.

22. The DCAA gives 14 points credit for promotion purposes to a GM-14 position if the applicant passed a CPA exam that was administered in the United States. Trial Transcript 142. The DCAA does not give the 14 points credit to GM-14 applicants who passed a CPA exam administered outside of the United States. Trial Transcript 142. The DCAA's policy is based on the fact that all 50 states in the United States administer a uniform examination. Therefore, those who have passed the CPA examination in the United States are recognized by, among others, the companies audited by the DCAA, to have met the standards of the American Institute of Certified Public Accountants. Trial Transcript 143 and 151-152.

23. Sometime before 1990, someone at DCAA Headquarters told Mr. Cruz that Mr. Cruz could not get the 14 points credit for promotion purposes for his Philippine Islands CPA, so he should stop putting down his Philippine Islands CPA on his promotion applications. *See* PTC ¶ 5o. Notwithstanding DCAA's decision, Mr. Cruz continued to seek the 14 points credit in his promotion applications. Trial Transcript 117-118.

24. Prior to 1991, Mr. Cruz did not seek EEO counseling regarding the DCAA's denials of the 14 points credit for promotion purposes for his Philippine Islands CPA. Trial Transcript 118.

25. In March 1989, Mr. Cruz was transferred to a Field Detachment office in which Warren Wright (white) was the GM-14 Field Audit Office Manager. *See* Trial Transcript 103; PTC ¶ 5i. The other GM-13 supervisors in that office were Ron Samuel (black), Leroy Endo (Japanese-American) and Michele Chamberlain (black). Trial Transcript 104.

26. Mr. Cruz's principal responsibility between March 1989 and September 1990 was in forward pricing. Trial Transcript 103. Forward pricing audits are audits conducted to assist the Government in negotiations regarding costs to be incurred in Government contracts.

27. Beginning in approximately October 1990, Mr. Cruz was moved to the defective pricing area. Trial Transcript 103. Mr. Cruz did not raise any objections to that move. Trial Transcript 104.

28. In or about November 1990, Mr. Hubbard named Mr. Bowers to be the Acting Resident Auditor (GM-14) at the Hughes/El Segundo Office. PTC ¶ n; Trial Transcript 173-174.

29. Mr. Cruz was not surprised or disappointed that he was not selected to the Acting GM-14 position at the Hughes/El Segundo office in 1990. Auditors in the Field Detachment were not eligible to be an Acting GM-14 in the regular DCAA (where this position was), and vice versa. Trial Transcript 105 and 174-175.

30. The position which gave rise to this charge of discrimination against the DCAA was JOA 90-54. PTC ¶ 5j.

31. Eleven promotion candidates applied for that GM-14 position. Trial Transcript 144. The DCAA's Career Development Board selected seven candidates for the BQL. Trial Transcript 145. These seven candidates were Louis D. Bowers, Felipe B. Cruz, Thomas F.H. Lerew, Frank L. Moore, Herman W. Sweenk, Marcus J. Turco, and Gary Whited. The BQL does not identify the race or national origin of any of the candidates on the BQL. Trial Transcript 145. The cutoff score was 100. *See* Exhibits 6 and 11.

32. Both Mr. Cruz and Mr. Bowers (white) were listed on the DCAA's best qualified list for the

position and both were referred to the Director of the DCAA as qualified for the position, along with five other applicants. PTC ¶ 5k.

33. The DCAA did not interview any of the applicants for the position announced in JOA 90-54. PTC ¶ 5n; Trial Transcript 150 and 170.

34. For JOA 90-54, Mr. Cruz originally received 14 points for having earned a CPA in the Philippines. However, DCAA Headquarters ordered that the 14 points be deducted from Mr. Cruz's total, because CPA's earned outside the United States were not given credit for promotion purposes. Even after the 14 points were deducted, Mr. Cruz remained on the BQL for JOA 90-54.

35. Mr. Cruz is not aware of any DCAA auditor who received the 14 points credit for a CPA earned from any country outside of the United States. Trial Transcript 116-117.

36. Mr. Cruz did not seek a GM-14 position outside of the Los Angeles and Orange County metropolitan areas, because he did not want a long commute or to relocate. Nor has Mr. Cruz worked for the DCAA outside of the Los Angeles area. PTC ¶ 5q.

37. Mr. Cruz testified that certain Rating and Ranking Schedules showed that he received 15 points for "experience". He believed that pursuant to the DCAA personnel manual, he should have received 20 points because he was a Field Detachment auditor. Trial Transcript 38 and 96.

38. However, the evidence showed that several other Field Detachment auditors also received "only" 15 points for their experience. Trial Transcript 47-48 and 96-101.

39. Mr. Cruz did not offer any evidence that he correctly construed the DCAA's personnel manual, or that his race or national origin were a factor in the

DCAA's alleged misinterpretation of its personnel manual. Indeed, he admitted that he had no idea whether, even if the figures were incorrect, they were anything other than clerical errors or simple mistakes. Trial Transcript 102.

40. Mr. Cruz also complained that he did not receive the one point for "professional activities" for his Dale Carnegie course. Trial Transcript 41.

41. Even if Mr. Cruz were entitled to the one point, he offered no evidence that his race or national origin were a factor in the DCAA's failure to give him the one point. Additionally, Mr. Cruz was unable to show that the alleged one point discrepancy would have made any difference to his promotion applications. Indeed, Mr. Reed testified to that [*sic*] contrary was true. Trial Transcript 157.

42. Mr. Hubbard, in a memorandum to the Director dated December 26, 1990, recommended Mr. Louis Bowers for the JOA 90-54 promotion. *See* Exhibit 19. His second choice was Frank Moore (black). Trial Transcript 176. His third choice was Mr. Cruz.

43. In that memorandum (Exhibit 19), Mr. Hubbard recommended Mr. Bowers because of Mr. Bowers' "varied DCAA experience as a supervisory auditor. His performance and experience clearly demonstrate that he can immediately manage the broad audit functions of a large field office." During Fiscal Year 1990, he successfully supervised the completion of "major and critical . . . audits . . . with very significant results." As the Acting GM-14 at the Hughes/El Segundo office, Mr. Bowers was "very effective in getting the FY91 program plan off to a good start. Finally, Mr. Bowers had "demonstrated his mobility with DCAA with three PCS [Permanent Change of Station] moves with DCAA."

44. Mr. Hubbard wrote that Mr. Moore had less depth and experience than Mr. Bowers, but demonstrated excellent long-term potential.

45. Mr. Hubbard wrote that Mr. Cruz's experience has been limited, primarily to supervising a small number of auditors on forward pricing audits. Mr. Cruz would need a longer development period before he could be expected to manage the broad audit functions of a Field Audit Office. Also, Mr. Bowers had superior Fiscal Year 1990 performance ratings to Mr. Cruz. Mr. Hubbard mentioned that Mr. Cruz has a CPA certificate from the Philippine Islands.

46. On January 4, 1991, Director Reed, concurring with Mr. Hubbard, chose Louis Bowers for the promotion to Resident Auditor pursuant to JOA 90-54. *See* PTC ¶ 51; Exhibit 6. Based on the information available to Mr. Reed at the time, he judged Mr. Bowers to be the most qualified applicant for the position. Trial Transcript 146.

47. Prior to the selection of the JOA 90-54 GM-14 position, Mr. Reed was not aware of the race or national origin of Mr. Cruz or Mr. Bowers.

48. Prior to the selection of the JOA 90-54 GM-14 position, Mr. Hubbard was not aware of Mr. Cruz's race or national origin. Trial Transcript 175. *See also* Trial Transcript 132.

49. In this action, Mr. Cruz has presented no evidence that he was more qualified for the promotion than Mr. Bowers. Further, Mr. Cruz presented no evidence that either race or national origin was a factor in Mr. Cruz's not receiving the JOA 90-54 promotion.

50. Mr. Cruz does not know another auditor of Filipino or Asian heritage who had been turned down for a GM-13 position or higher at the DCAA. Trial Transcript 102-103.

51. The DCAA has never had a quota or otherwise limited the number of Filipinos or Asians who can be GM-14s. Trial Transcript 148 and 177.

52. Ms. Zeniadia Pangilinan was promoted to a GM-14 position with the DCAA in approximately 1988. Ms. Pangilinan was born and raised in the Philippine Islands. Trial Transcript 118-119, 147 and 176. Like Mr. Cruz, Ms. Pangilinan had a Filipino accent. Trial Transcript 119. Mr. Hubbard had recommended her for the GM-14 position. Trial Transcript 176. Her Filipino origin was not a factor in Mr. Hubbard's decision to recommend her for a GM-14 position. Trial Transcript 176.

53. Mr. Reed selected Ms. Pangilinan for the GM-14 position in approximately 1988. Trial Transcript 119 and 177. Mr. Reed did not know of Ms. Pangilinan's Filipino heritage when he selected her in 1988 for a GM-14 position. Trial Transcript 147.

54. No DCAA employee harassed or took reprisal on Mr. Cruz for his having invoked the EEO procedures, or on account of Mr. Cruz's race or national origin.

55. In approximately March 1991, Mr. Cruz filed his EEO complaint for not receiving the JOA 90-54 promotion. Trial Transcript 123. The EEO complaint was against Mr. Hubbard of the regular DCAA, not Warren Wright of the Field Detachment. Trial Transcript 123.

56. In approximately March 1991, Mr. Cruz mentioned to Mr. Wright, his supervisor, that he would be filing an EEO complaint. According to Mr. Cruz, Mr. Wright responded: "You don't have any [sic] leg to stand on." Trial Transcript 123. Mr. Wright spoke in a normal tone of voice, in a "friendly conversation." Trial Transcript 124.

57. Shortly after Mr. Cruz filed the EEO complaint, Mr. Cruz sought advice from Mr. Wright about it. Mr. Cruz testified that Mr. Wright told Mr. Cruz that he (Mr. Wright) did not want to get involved, and that Mr. Cruz was on his own. Mr. Wright did not raise his voice in that conversation. Trial Transcript 124.

58. Mr. Wright had raised his voice to him (Mr. Cruz), as well as to Leonard Parker and Brenda Wilson. *See* Trial Transcript 124-125. To the best of Mr. Cruz's knowledge, Mr. Parker and Ms. Wilson had not filed an EEO complaint or grievance before Mr. Wright raised his voice to Mr. Parker or Ms. Wilson. Trial Transcript 125-126.

59. Mr. Wright had yelled at Ron Samuel, who was a GM-13 Supervisory Auditor in the office with Mr. Wright and Mr. Cruz. Mr. Samuel had not filed an EEO complaint or grievance against Mr. Wright prior to that incident.

60. Mr. Cruz testified that he was recently subjected to an Inspector General examination because of "continued harassment by Headquarters." Trial Transcript 93. However, Mr. Reed presented uncontroverted testimony that the Inspector General examination was not directed at Mr. Cruz. Trial Transcript 148.

61. Any Finding of Fact which is erroneously designated as a Conclusion of Law is incorporated herein by reference.

CONCLUSIONS OF LAW

1. This Court properly has jurisdiction under Title VII, 42 U.S.C. § 2000e, *et seq.* for claims of race and/or national origin discrimination with respect to JOA 90-54 and subsequent reprisal. To the extent plaintiff now tries he alleged [*sic*] gender-based discrimination, there is no jurisdiction because plaintiff failed to allege such discrimination at the administrative level or even for the greater part of this litigation.

2. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, prohibits discrimination in employment on the basis of race, color, religion, sex, national origin, or reprisal. For Federal employees, 42 U.S.C. § 2000e-16 provides the exclusive remedy for claims of employment discrimination. *See Brown v. General Services Administration*, 425 U.S. 820, 835, 96 S. Ct. 1961, 48 L.Ed.2d 402 (1976).

3. A Title VII plaintiff has the initial burden of proving by a preponderance of the evidence a prima facie case of discrimination. *See Patterson* v. *McLean Credit Union*, 491 U.S. 164, 186, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989).[1] If the plaintiff succeeds in proving a prima facie case, the burden then shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection. *See Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-54, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); *McDonnell Douglas Corp. v.*

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[1] The phrase "prima facie case" in the Title VII context means that plaintiff establish a legally mandatory, rebuttable presumption, not merely produce enough evidence to permit the trier to fact to infer the fact at issue. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 n. 7, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).

Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). "The defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." *Burdine*, 450 U.S. at 254 (citation omitted).

4. Should the defendant carry this burden, the plaintiff then must prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. *Burdine*, 450 U.S. at 253.

5. "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.* "[T]he burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978).

6. The Supreme Court explicitly rejected the view requiring an employer to hire the minority or female applicant whenever that person's objective qualifications were equal to those of a white male applicant. *Burdine*, 450 U.S. at 259. Under Title VII, "the employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria." *Id.*

7. The prima facie case method is not intended to be rigid, mechanical, or ritualistic, but merely a sensible, orderly way to evaluate the evidence as it bears on the critical question of discrimination. *See U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983). This approach, however, has been continually applied

to individual actions alleging disparate treatment in numerous areas, including promotion, discipline, and retaliation. *See* B. Schlei & P. Grossman, *Employment Discrimination Law*, pp. 13-14 (2d ed. 1983) ["*Schlei & Grossman*"] & Five-Year Cumulative Supplement ["Cum. Supp."], pp. 474-75 (1989).

8. A prima facie case of race discrimination is established by showing (1) that the complainant belongs to a racial minority; (2) that he applied and was qualified for a job for which the employer was seeking applicants; (3) that, despite his qualifications, he was rejected; and (4) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. *See McDonnell Douglas Corp. v. Green*, 411 U.S. at 802. Modified to a promotion context, the elements are that (1) plaintiff is a member of a class protected by Title VII, (2) plaintiff was qualified for the position sought, (3) plaintiff was denied promotion, and (3) others with similar qualifications achieved the position. *See Lynn v. Regents of University of California*, 656 F.2d 1337, 1341 (9th Cir. 1981) (sex discrimination), *cert. denied*, 459 U.S. 823, 103 S.Ct. 53, 74 L.Ed.2d 59 (1982).

9. "The 'factual inquiry' in a Title VII case is '[whether] the defendant intentionally discriminated against the plaintiff.' In other words, is 'the employer . . . treating 'some people less favorably than others because of their race, color, religion, sex, or national origin.'" *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. at 715, quoting *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 253, and *Furnco Construction Corp. v. Waters*, 438 U.S. at 577. "[A] plaintiff will fail to establish a prima facie case when the evidence consists of nothing more than

a claim of being in a protected group [or] of simply feeling discriminated against . . . ." *Schlei & Grossman*, Cum. Supp., p. 477. *See, e.g., Holley v. Sanyo Mfg., Inc.*, 771 F.2d 1161, 1168 (8th Cir. 1985) (plaintiff's "subjective reactions" to employer's action "are not sufficient to make his case"); *La Grant v. Gulf & Western Manufacturing Co.*, 748 F.2d 1087, 1091 (6th Cir. 1984) (plaintiff's "subjective determination that he was better qualified" insufficient).

10. Probative in disparate treatment cases is comparative evidence of the qualifications of the applicants. *See Schlei & Grossman*, p. 15. A court, however, "err[s] in requiring the defendant to prove by objective evidence that the person hired or promoted was more qualified than the plaintiff." *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 258. "*McDonnell Douglas* teaches that it is the plaintiff's task to demonstrate that similarly situated employees were not treated equally." *Id.*, citing *McDonnell Douglas Corp. v. Green*, 411 U.S. at 804.

11. "[T]he employer's burden is satisfied if he simply 'explains what he has done' or 'produc[es] evidence of legitimate nondiscriminatory reasons.'" *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 256, quoting *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 25 n.2, 99 S.Ct. 295, 58 L.Ed.2d 216 (1978). "Title VII . . . does not demand that an employer give preferential treatment to minorities or women." *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 259, citing 42 U.S.C. § 2000e-2(j) and *United Steelworkers of America v. Weber*, 443 U.S. 193, 205-206, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979). A court may not "requir[e] the employer to hire the minority or

female applicant whenever that person's objective qualifications were equal to those of a white male applicant." *Id.* Title VII does not obligate an employer to accord this preference. Rather, the employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria." *Id.* "Indeed, Title VII does not ensure the best will be selected—only that the selection process will be free from impermissible discrimination." *Casillas v. United States Navy*, 735 F.2d 338, 344 (9th Cir. 1984).

12. Moreover, Title VII "was not intended to 'diminish traditional management prerogatives.' It does not require the employer to restructure his employment practices to maximize the number of minorities and women hired." *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 259, quoting *United Steelworkers of America v. Weber*, 443 U.S. at 207, and citing *Furnco Construction Corp. v. Waters*, 438 U.S. at 577-578. "Title VII is not a civil code of employment criteria . . . . [It] is the law's promise that employment decisions will not be based on non-permissible discriminatory criteria, not that subjective criteria will be eliminated." *Casillas v. United States Navy*, 735 F.2d at 344-345.

13. "Courts have generally accepted the use of subjective criteria in promotions to upper-level or professional or other positions requiring specialized abilities where promotion judgments cannot readily be based on quantifiable data," whereas the practice may be scrutinized "much more closely" in "blue-collar or low-level promotions." *Schlei & Grossman*, Cum. Supp., pp. 255-57. *See Robinson v. Lehman*, 771 F.2d 772, 779 (3d Cir. 1985); *Maddox v. Claytor*, 764 F.2d 1539 (11th Cir. 1985); *Grano v. Department of Development*, 699 F.2d 836, 837 (6th Cir. 1983)

(employer's subjective evaluations of employee's performance sufficient to rebut prima facie case).

14. Legitimate reasons for failure to promote may include "lack of job qualifications, superior qualifications of other candidates, insubordination, improper conduct and poor relationships with other employed . . . and the fact that the employee did not get along with his supervisor . . . ." *Schlei & Grossman*, Cum. Supp., p. 233. *See also id.*, pp. 479-80.

15. Lack of experience is a common reason. *See Casillas v. United States Navy*, 735 F.2d 338, 344 (9th Cir. 1984); *Meyer v. Lehman*, 37 FEP 1565 (N.D. Cal. 1983) (Navy did not violate Title VII by rejecting civilian female candidate for promotion to supervisory position due, in part, to her lack of supervisory experience), *aff'd*, 734 F.2d 21 (9th Cir. 1984), *cert. denied*, 469 U.S. 1208, 105 S.Ct. 1173, 84 L.Ed.2d 323 (1985). *See also Bauer v. Bailar*, 647 F.2d 1037, 1048 (10th Cir. 1981).

16. Personality and insubordination are also legitimate reasons. *See, e.g., Brooks v. Ashtabula County Welfare Dept.*, 717 F.2d 263, 266 (6th Cir. 1983), *cert. denied*, 466 U.S. 907, 104 S.Ct. 1687, 80 L.Ed.2d 160 (1984).

17. There was no unfairness in withholding the 14 points from Mr. Cruz because his CPA license was earned outside of the United States. The State of California permits reciprocity under certain circumstances for accountants licensed in the other 49 States—but, like the DCAA, California does not provide for reciprocity for those who earn CPA certificates in a foreign country. California Business & Professions Code § 5087.

18. Fed.R.Civ.P. 52(c) provides: "If during a trial without a jury a party has been fully heard with respect to an issue and the court finds against the

party on that issue, the court may enter judgment as a matter of law against that party on any claim . . . ." One treatise construes Fed.R.Civ.P. 52(c) as follows:

> [Summary judgment standards do *not* apply.
>
> The [Fed.R.Civ.P. 52(c)] motion simply asks whether or not plaintiff has presented sufficient evidence to *prove* his or her claim. The court is not required to view the evidence in the light most favorable to plaintiff or draw any special inferences. It may *weigh* and *evaluate* the evidence, resolve any conflicts in the evidence, and decide issues of credibility.

W. Schwarzer, A. Tashima & J. Wagstaffe, *Cal. Prac. Guide: Fed. Civ. Pro. Before Trial*, ¶ 14:27 (TRG 1992) (emphasis in original). *See also* Advisory Committee Notes on 1991 Amendment to Fed.R.Civ.P. 52(c) (distinguishing standard for Fed.R.Civ.P. 52(c) motion from standard for Fed.R.Civ.P. 56 motion). Additionally, the Advisory Committee Notes describe Fed.R.Civ.P. 52(c) as "authoriz[ing] the court to enter judgment at any time that it can appropriately make a dispositive finding of fact on the evidence."

19. Defendant put on two witnesses (Mr. Reed and Mr. Hubbard) who established that Mr. Bowers was at least as qualified as Mr. Cruz for the promotion—and indeed, more qualified. Based on all of the evidence introduced at trial, defendant established legitimate, nondiscriminatory reasons for the DCAA's decision to promote Mr. Bowers instead of Mr. Cruz (and the other five applicants on the BQL). Plaintiff did not prove that the legitimate reasons offered by the DCAA were not its true reasons, but were a pretext for discrimination.

20. A prima facie case of retaliation is established by showing that (1) the employee engaged in a

protected activity; (2) the employee was thereafter subjected to an adverse employment decision; and (3) a causal link exists between the two. *See Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir. 1982). The term "adverse employment decision" has been interpreted to mean that "the position was eliminated as to" the employee "because of the protected activities." *Ruggles v. California Polytechnic State University*, 797 F.2d 782, 786 (9th Cir. 1986). Moreover, "[e]ssential to a causal link is evidence that the employer was aware that the plaintiff had engaged in the protected activity." *Cohen v. Fred Meyer, Inc.*, 686 F.2d at 796.

21. The burden of production in a retaliation claim is consistent with the *McDonnell Douglas* analysis. A plaintiff must make out a prima facie case of retaliation. At that point, the defendant must articulate some legitimate, nondiscriminatory reason for the "adverse employment decision." Then, plaintiff must prove that the proffered reasons were pretexts for retaliation or that a discriminatory reason more likely motivated the employer's action. If the plaintiff shows that the adverse employment decision was the product of retaliatory intent, the defendant may show that the adverse action would have been taken in the absence of discriminatory or retaliatory intent. *Ruggles*, 797 F.2d at 786.

22. The evidence showed that Mr. Wright yelled at DCAA employees who had not previously filed EEO complaints or grievances against him—including Mr. Samuel.

23. Mr. Reed established that the Inspector General's review of audits in California was not specifically targeted at Mr. Cruz.

24. Plaintiff has failed to prove that he was subjected to any other unlawful harassment or

retaliation. The testimony of one witness Mr. Cruz called on the retaliation issue, Phillip Rogers, was particularly untrustworthy.

25. Any Conclusion of Law erroneously designated as Finding of Fact is incorporated herein by reference.

DATED: Mar. 30, 1993.

/s/ Manuel L. Real
Chief United States District Judge

Presented by:

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APPENDIX B

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CV 92-3109-R

FELIPE B. CRUZ,
PLAINTIFF

v.

LES ASPIN, SECRETARY DEPARTMENT OF DEFENSE;
U.S.A.,
DEFENDANT

[ENTERED MAR. 31, 1993]

JUDGMENT

The action came on for trial before the Court, the Honorable Manuel L. Real, Chief United States

District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that plaintiff take nothing, that the action be dismissed on the merits, and that defendant recover of the plaintiff its costs of action.

DATED: Mar. 30, 1993.

/s/ Manuel L. Real
Chief United States District Judge

Presented by:

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United States Attorney

LEON W. WEIDMAN
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Chief, Civil Division

/s/ Robert I. Lester
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